IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

RFA No. 32 of 2000

Date of Decision: 26th December, 2007

Devi Dass and others	Appellants
Versus	
State of Himachal Pradesh	Respondent

Coram

The Hon'ble Mr. Justice Sanjay Karol,J.

Whether approved for reporting[1]? Yes.

For the appellants: Mr.Bhupender Gupta, Sr. Advocate, with
Ms. Charu Gupta, Advocate.

For the respondent: Mr. Ashok Chaudhary, Addl. Advocate General.

Sanjay Karol, J. (Oral)

The present appeal arises out of judgment and decree dated 25.8.1999 passed by Additional District Judge, Shimla, in Civil Suit No. 72-S/1 of 95/89, titled as Atma Ram (since deceased) through its LRs Mansa Ram and others vs. State of H.P., dismissing the plaintiff's suit for recovery of a sum of Rs.2,50,000/-.

Shri Atma Ram, (referred to as the plaintiff) filed a suit for recovery of Rs.2,50,000/- for the damage caused to his land by the defendant while constructing the Devgarh Link Road through his land. Shri Atma Ram died during the pendency of the suit and his legal heirs, present appellants (hereinafter referred to as the legal heirs) were substituted in his place. The plaintiff's claim is to the effect that he was

[1] Whether the reporters of Local Papers are allowed to see the Judgment?

the owner in possession of 57-3 Bighas of land comprised in 559, 561/1, 563, 663, 566, 568, 571, 574, 575, 577, 497, 497/1, 579 and 583, situated in Chak Baghi, Tehsil Kotkhai, District Shimla and also one "Gharat" (water mill), situate over land bearing Khasra No. 580, measuring 1-1-0 bigha. In the year 1979, the defendant through the Public Works department undertook the construction of Devgarh link road. Part of plaintiff's land alongwith land of other land owners was acquired for the said purpose. However, the defendant constructed road, in excess of the acquired land and upon unacquired land measuring 2-19 Bighas comprised in Khasra No. 564 and 575. While constructing the road, plaintiff's un-acquired land measuring 5 Bighas comprised in Khasra Nos. 566/1, 575/2, 575/3 and 579/2 got damaged due to the throwing of debris on the same, slipping of the land in land slides as the construction was not carried out in a safe manner. Further plaintiff's total land measuring 8-1 Bighas comprised in Khasra Nos. 583, 575/1 and 579/1 was rendered unfit for cultivation. Plaintiff's water mill and water channel constructed on Khasra No. 580 and 566 was also destroyed and no compensation was paid for the same.

The plaintiff pursued the matter with the Chief Minister and also filed Civil Writ Petition No. 239 of 1988 before this Court, and after its decision fresh acquisition proceedings were initiated but even then, only part of the plaintiff's unacquired land over which road was constructed was subsequently acquired.

The plaintiff also got legal notice served upon the defendant seeking damages. In the absence of any action, the plaintiff was left with no option but to file a suit claiming a sum of Rs.2,50,000/-

alongwith interest @ Rs.12% per annum. The damage claimed is towards (i) Rs.1,18,000/- for destruction of land measuring 5 Bighas 18 Biswas (ii) Rs.85,000/- damage caused to land measuring 8 Bighas 1 Biswa rendering the same unfit for cultivation due to throwing of debris (iii) Rs.26,000/- estimated cost for removal of debris (iv) Rs.13,000/- damage caused to retaining wall and (v) Rs.27,000/- damage caused to Gharat (water mill). In all, plaintiff claimed a sum of Rs.2,69,000/- and after deducting a sum of Rs.4,092/- already paid by the defendant a suit for recovery of Rs.2,50,000/- was filed.

On merits, the suit was resisted by the defendant on the ground that adequate compensation for the acquisition of the plaintiff's land stood paid. Additionally damage caused to his property was got assessed for a sum of Rs.4092/- which also stood paid by the defendant.

Based on the pleadings of the parties, the Court framed the following issues:-

"1. Whether suit is bad for non-joinder of necessary party? OPD

2. Whether any part of the plaintiff's claim is barred under the provisions of Order II Rule 2, CPC. OPD.
3. whether land measuring 5 Biswas and 13 biswas comprising in Khasra No. 564 and 575 belonging to plaintiff has been brought under road, which was constructed by the defendant? OPP
4. If so, how much compensation he is entitled for? OPP
5. Whether 5 bighas of land belonging to the plaintiff comprising Khasra No.566/1, 575/2 and 3 and 579/2 was completely destroyed by land slides due to the negligence of defendants and cannot be restored to its original condition? OPP.
6. If so, how much compensation, he is entitled for? OPP.
7. Whether land measuring 8.1 bighas belonging to the plaintiff was damaged by the defendants by throwing debris as a result of which the said land became unfit for cultivation? OPP
8. If so, how much amount by way of compensation he is entitled for? OPP
9. Whether stones of a retaining wall belonging to the plaintiff were removed and used in the construction of road by the

defendants and consequently said wall which was 580 feet collapsed? OPP.

10. If Issue No.9 is decided in affirmative, to what compensation by way of damages, the plaintiff is entitled to for re-constructing the same? OPP.
11. Whether Gharat allegedly in Khasra No. 580 has been made useless by the debris thrown by the defendants. If so, how much amount by way of damages he is entitled for? OPP.
12. Relief."

In order to prove their case, plaintiff examined four witnesses and the defendant examined one witness. At this point it is relevant to notice that the trial Court had appointed Tehsildar, Kotkhai, as Local Commissioner to inspect the spot and prepare Tatima (spot map) with respect to the damage, if any, caused to the plaintiff's property. Local Commissioner submitted his report on 9.7.1990. Objections to the said report were filed by the defendant and it was so ordered that the report of the Local Commissioner alongwith its objections would be considered at the time of final hearing.

The trial Court decided Issues No.1 and 2 against the defendant and issues No.3 to 11 were decided against the plaintiff. While deciding issues Court came to the conclusion that Ext.PW-4/S could not be relied upon as the document was only exhibited without examining the government official who had prepared the same. Further there was no proof of the extent of damage caused to the plaintiff's land. Report Ext.PW-4/T was not taken into account. Similarly, report Ext.PW-4/A was also disbelieved for the reason that expert was not examined as a witness and no reliance could be placed upon the same. Vide judgment and decree dated 25.8.1999, the plaintiff's suit was dismissed.

I have perused the record and heard the learned counsel for the parties.

Shri Gian Singh (PW-1) has deposed that he knew the plaintiff and his land was acquired for the purposes of construction of Devgarh Link road and due to construction of said road their land, retaining wall and Gharat (water mill) were damaged. Due to falling of debris the land also become uncultivable and fallow.

Shri Bhagat Singh (PW-2) is the Kanungo, who issued the Tatima (spot map) for the purpose of preparation of damage report. Dila Ram (PW-3), Pradhan of the Panchayat, has also deposed that land belonging to the plaintiff was acquired and road was also constructed through his land. While constructing the same, debris was thrown on the lower side of the road and the plaintiff's land above the road also got damaged due to land slides. No steps were taken to save the land from the land slides and also the debris was thrown down-hill rendering the land below the road fallow and uncultivable.

Shri Devi Dass (PW-4), has deposed that land comprised in Khasra No. 583 measuring 2-5 Bighas got destroyed due to falling of debris and land comprised in Khasra No. 566 was destroyed due to land slides. Even the retaining wall (360 ft. length and 6 ft. height) was damaged due to the falling of the debris. Additionally water mill and water channel on Khasra No. 580 and 580/1 also got destroyed due to falling of debris. The estimate for repair of the wall Ext.PW-4/A and removal of debris Ext.PW-4/B were got prepared by him. He suffered approximately Rs.2000/- per month as loss of income. The damage occurred due to the negligence of the executing agency. The fact that his

property stood damaged was brought to the notice of the Chief Minister which is evident from the reply Ext.PW-1/C. He got prepared site plans Ext.PW-4/D and Ext.PW-4/E (tatimas) showing the extent of construction of road. He got notice dated 30.7.1987 Ext. PW-4/F issued to the Collector. The award acquiring only part of his land is Ext.PW-4/J. He has proved the order 12.7.1988 Ext.PW-4/K passed by this Court in Civil Writ Petition and Notification Ext.PW-4/L issued pursuant to the orders passed by this Court. Legal notice Ext.PW-4/M under Section 80, CPC was also got issued by him. He obtained Jamabandi Ext.PW-4/R and Khasra Girdwari Ext.PW-4/S (revenue records) of the land in question. File prepared by revenue officials in relation to damage caused to his land Ext.PW-4/T was also got exhibited by him. According to this witness, his total land measuring 13-02 Bighas got destroyed. His statement virtually goes unrebutted and there is no effective cross-examination, much less on the aforesaid deposition. He appears to be a truthful witness and there is nothing in the cross-examination which would impeach his credibility.

Shri Y.P. Prabhakar (DW-1) is the sole witness of the defendant. Importantly, in his examination-in-chief he has admitted that appellants' land got damaged. According to him compensation for the acquired land and also the damaged land was paid and the water mill was got repaired. In cross-examination, however, he has admitted that he was not concerned Engineer, posted at the time of construction of road and had never inspected the land in question and did not know the extent of damage caused to the land. With respect to the repair of the water mill he could not produce the record as the same was not available with him.

According to him out of the total land holding of the plaintiff only 2-15 Bighas out of which 2-1 Bighas falling in Khasra No.563/1 was acquired. He has admitted that at the time of construction of road the debris was thrown on the lower side of the road and from the upper side of the road land slides did occur. He did not know whether any measures were taken to save the land or not. He has admitted that no retaining wall was put up to save the appellants land. He has shown his ignorance about the proceedings pertaining to the damage assessed by the defendant.

From the statement of PW-4 and Ext.PW-4/A, it is clear that Rs.65,272/- is the estimate for the repair of the retaining wall. The issue of payment of compensation for the damage caused to the property was pursued by the plaintiff from time to time and is evident from the copies of the replies sent by office of Chief Minister Ext.PW-4/C, legal notice dated 3.6.1987 (Ext.PW-4/F); copies of orders dated 12.7.1988 and 21.9.1988 (Ext.PW-4/K) passed by this Court in CWP No. 239/1988, titled as Atma Ram vs. State of H.P.; Notification issued under Section 4 of Land Acquisition Act dated 20.9.1988 (Ext.PW-4/L) and legal notice issued under Section 80, CPC dated 31.8.1988 (Ext.PW-4/M).

The plaintiff and his successor-in-interest have been vigorously pursuing the matter and repeatedly knocking the doors of the authorities concerned. Unfortunately in the present case, the respondent did not take any remedial measures to save the damages caused to the plaintiff's property. The plaintiff's unacquired land stood damaged due to construction of road as is evident from the statements of PW-1, PW-2, PW-3 and PW-4 as also defendant's own witness DW-1. From Ext.PW-4/F and Ext.PW-4/M it is clear that father of the appellants had been

repeatedly informing the authorities about the extent of the damage caused to his land. It was only with the intervention of this Court that Notification for acquisition of land was issued and that too only for part of the land over which the road was constructed. The fact that plaintiff's property was damaged is also evident from the defendant's own record produced by the plaintiff, which is Ext.PW-4/R, Ext.PW-4/S and Ext.PW-4/T. Ext.PW-4/T, the report submitted by Tehsildar clearly indicates that the property measuring 13 Bighas and 7-2 Bighas on Khasra Nos. 366/1, 575/1, 575/2, 575/3, 579/1, 579/2, 580 and 583 stood damaged and Rs.48,570/- is the damage assessed by the revenue authorities for the loss of crop, apart from the damage caused to the retaining wall constructed on Khasra No. 566/1. The report Ext.PW-4/T was prepared by the Tehsildar. There is no dispute with regard to the dimensions of the retaining wall as is clear from the report itself. It is strange that during trial the defendant has denied its own document which stands proved and exhibited during trial. It is not the defendant's case that document Ext.PW-4/T was not prepared by the revenue official without authority or was prepared in collusion with the plaintiff. It has been prepared in discharge of his official duties. The defendant did not produce this document, which, it was duty bound to do so, therefore, the plaintiff produced the same. The authenticity and the genuineness of the report is not in dispute.

In *P.C.Purushothama Rediiar v. S.Perumal,* AIR 1972 SC 608, the Apex Court has held as under:-

> "18. Before leaving this case, it is necessary to refer to one of the contentions taken by Mr.Ramamurthi, learned counsel for the respondent. He contended that the Police reports referred to earlier are inadmissible in evidence as

> the Head Constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence, it is not open to the respondent now to object to their admissibility – see Bhagat Ram v. Khetu Ram, AIR 1929 PC 110.
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> 19. It was next urged that even if the report in question are admissible, we cannot look into the contents of those documents. This contention is again unacceptable. Once a document is properly admitted, the contents of that document are also admitted in evidence though those contents may not be conclusive evidence."

It is not the case of defendant that no damage had been caused to the plaintiff's land. The plaintiff and his successor-in-interest have been persistently informing the matter and were made to run from pillar to post. The factum and the extent of damage was not disputed by the State till the time the written statement was filed in the Court. The contents of the legal notices were not refuted at all. In any case the plaintiff has by cogent and convincing evidence proved the extent of damage caused to the land and also the fact that the defendant has been negligent in constructing the road and destroying the plaintiff's property. The same cannot be restored as the same was washed away in land slides. In the written statement, the defendant has in fact admitted having paid Rs.4092/- as damages to the plaintiff but no evidence whatsoever, has been led by the defendant to substantiate the extent of damage and the assessment carried out by them. Further no objection was taken by the defendant at the time of proving said documents. Therefore, Ext. PW-4/S

and Ext.PW-4/T can be looked into for the purpose of ascertaining the damage assessed by the defendant itself.

With regard to plaintiff's claim towards value of excess land other than the acquired land, over which road has been constructed by respondent-State, in my view, there is no evidence on record. It is the specific case of the plaintiff that on Khasra Nos. 564 and 575 measuring 2-19 Bighas road has been constructed. However, the same is not proved by any of the witnesses and in any case the same does not form part of the relief claimed, therefore, the same needs to be rejected.

As per report Ext.PW-4/T, the defendant has itself assessed the damage caused to plaintiff for loss of crop w.e.f. 1981 to 1987 at Rs.48750/-. In the said report, the defendant has stated that on Khasra No. 566/1, wall measuring 360 ft. in length and 6 ft. in height was also damaged and was required to be assessed by the department separately. In the plaint, the plaintiff has claimed only a sum of Rs.13,000/- towards the damage caused to the retaining wall. The plaintiff has proved the dimensions of the wall and also the fact that the wall was damaged due to falling of debris. In fact this fact stands admitted by DW-1. Even though as per report Ext.PW-4/A the damage assessed is Rs. 65272/-. However, the plaintiff's claim as claimed for in the plaint is restricted to Rs.13,000/- and is awarded.

In the plaint, the plaintiff has claimed Rs.27,000/- towards damage caused to his Gharat. It is proved on record that due to falling of debris the plaintiff's Gharat and water channel were damaged. Accordingly, a sum of Rs.27,000/- as claimed by the plaintiff in the plaint is awarded.

The plaintiff has further claimed a sum of Rs.85,000/- as damage caused to land measuring 8 Bighas 1 Biswa rendering the same unfit for cultivation due to throwing of debris. As per report Ext.PW-4/T, the defendant itself has assessed the same as Rs.48,750/-. It is the plaintiff's case that he has been deprived of his income @ Rs.2000/- per month from the water mill and loss of crop on the said land but there is no documentary evidence on record. Therefore, plaintiff's claim, is restricted to a sum of Rs.48,750/-, as assessed by the defendant itself.

The fact that debris had fallen due to construction of road duly stands proved on record and the claim of plaintiff for Rs.26,000/- as estimated cost of removal of debris is also allowed and the plaintiff shall also be entitled to the said sum.

With regard to plaintiff's claim of Rs.1,18,000-00 for destruction of land measuring 5 Bighas 18 Biswas, be it stated that in the report Ext.PW-4/T, the land measuring 13 Bighas 2 Biswas, which has been rendered unfit for cultivation has been considered while assessing a sum of Rs.48,750/-. There is no other evidence on record to show the valuation of plaintiff's land measuring 5 Bighas 18 Biswas separately and, therefore, this claim is rejected.

For the aforesaid reasons, the claim of the appellants is decreed to the extent of Rs.1,14,750-00 , that is, for

Gharat (water mill) - Rs.27,000-00

Retaining wall - Rs.13,000 -00

For removal of debris - Rs.26,000-00

Loss of crop etc. - Rs.48,750-00

However, an amount of Rs.4,092/- already paid by the defendant is required to be deducted from the decretal amount.

The plaintiff and his legal heirs have been pursuing their remedies before the authorities and were made to run from pillar to post. Plaintiff and his legal heirs were forced to knock the doors of the Court on different occasions. The appellants shall be entitled to interest pendente lite and future @ 9 % per annum on the decretal amount. The appellants shall also be entitled to costs, which is assessed at Rs.5000/-.

For the foregoing reasons and observations, the present appeal is allowed and the judgment and decree dated 25.8.1999 passed by Additional District Judge, Shimla, in Civil Suit No. 72-S/1 of 95/89 is set aside and the suit of the plaintiff is decreed to the extent mentioned above. The decree-sheet be prepared accordingly.

December 26, 2007 (Sanjay Karol)
(C) Judge.